

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

JANICE R. RUSSELL, Trustee of the MASSA FAMILY TRUST

## DEFENDANTS

NATIONWIDE MUTUAL INSURANCE COMPANY, DOE ONE, DOE TWO, DOE THREE, DOE FOUR, DOE FIVE, DOE SIX, DOE SEVEN, DOE EIGHT, DOE NINE and DOE TEN

## (b) County of Residence of First Listed Plaintiff

(EXCEPT IN U.S. PLAINTIFF CASES)

## County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

## (c) Attorney's (Firm Name, Address, and Telephone Number)

Julian J. Pardini, Esq. (SB # 133878)  
LEWIS BRISBOIS BISGAARD & SMITH  
One Sansome Street, 14th Floor  
San Francisco, CA 94104  
(415) 362-2580

## Attorneys (If Known)

JOHN F. DeMEO, Esq; JOSHUA M. WEST, Esq.  
CARMEN D. SINIGIANI, ESQ.  
DeMEO DeMEO & West  
565 West College Avenue  
Santa Rosa, CA 95401 Ph: (707) 545-3232

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- |  |   |
|--|---|
| <input type="checkbox"/> U.S. Government Plaintiff   | <input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)                     |
| <input type="checkbox"/> 2 U.S. Government Defendant | <input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III) |

## III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	PERSONAL PROPERTY	FOREIGN RELATIONS	BANKRUPTCY	OTHER STATUTES
<input checked="" type="checkbox"/> 110 Insurance	<input type="checkbox"/> PERSONAL INJURY	<input type="checkbox"/> PERSONAL INJURY	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 430 Banks and Banking	<input type="checkbox"/> 430 Commerce
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 630 Liquor Laws	<input type="checkbox"/> 450 Deportation	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 640 R.R. & Truck	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations	<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 650 Airline Regs.	<input type="checkbox"/> 490 Cable/Sat TV	<input type="checkbox"/> 510 Selective Service
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 660 Occupational Safety/Health	<input type="checkbox"/> 520 Securities/Commodities/ Exchange	<input type="checkbox"/> 530 Customer Challenge 12 USC 3410
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 690 Other	<input type="checkbox"/> 540 Other Statutory Actions	<input type="checkbox"/> 550 Agricultural Acts
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 390 Other Personal Property Damage	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 560 Economic Stabilization Act	<input type="checkbox"/> 570 Environmental Matters
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 400 Other Civil Rights	<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 580 Freedom of Information Act	<input type="checkbox"/> 590 Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 195 Contract Product Liability			<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 600 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 595 Constitutionality of State Statutes
<input type="checkbox"/> 196 Franchise			<input type="checkbox"/> 740 Railway Labor Act		
			<input type="checkbox"/> 750 Other Labor Litigation		
			<input type="checkbox"/> 760 Empl. Ret. Inc. Security Act		
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS		PROPERTY RIGHTS	
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motion to Vacate Sentence	<input type="checkbox"/> 810 HIA (1395ff)	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 750 Customer Challenge 12 USC 3410
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 520 General	<input type="checkbox"/> 822 Black Lung (923)	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 760 Other Statutory Actions
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/ Accommodations	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 770 Agricultural Acts
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 540 Mandamus & Other	<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 780 Economic Stabilization Act
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 445 Amer. w/Disabilities- Employment	<input type="checkbox"/> 550 Civil Rights	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 790 Environmental Matters
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 446 Amer. w/Disabilities- Other	<input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 880 Other		<input type="checkbox"/> 800 Freedom of Information Act
	<input type="checkbox"/> 440 Other Civil Rights				<input type="checkbox"/> 810 Appeal of Fee Determination Under Equal Access to Justice
					<input type="checkbox"/> 820 Constitutionality of State Statutes

## V. ORIGIN (Place an "X" in One Box Only)

- |  |  |  |   |  |   |  |
|--|--|--|---|--|---|--|
| <input type="checkbox"/> 1 Original Proceeding | <input checked="" type="checkbox"/> 2 Removed from State Court | <input type="checkbox"/> 3 Remanded from Appellate Court | <input type="checkbox"/> 4 Reinstated or Reopened | <input type="checkbox"/> 5 Transferred from Another district (specify) | <input type="checkbox"/> 6 Multidistrict Litigation | <input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment |
|--|--|--|---|--|---|--|

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. 1332

Brief description of cause: Plaintiff filed breach of contract, breach of covenant of good faith and fair dealing action.

## VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION DEMAND \$ 0.00  
UNDER F.R.C.P. 23

CHECK YES only if demanded in complaint  
JURY DEMAND:  YES  NO

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

February 13, 2008

Julian J. Pardini

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

1 **LEWIS BRISBOIS BISGAARD & SMITH LLP**  
2 JULIAN J. PARDINI, SB# 133878  
3 One Sansome Street  
4 Suite 1400  
5 San Francisco, California 94104  
6 Telephone: (415) 362-2580  
7 Facsimile: (415) 434-0882  
8 pardini@lbbslaw.com

9 Attorneys for Defendant  
10 NATIONWIDE MUTUAL INSURANCE COMPANY

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

CV 08 0918

12 JANICE R. RUSSELL, Trustee of the MASSA ) CASE NO.  
13 FAMILY TRUST, )  
14 Plaintiff, )  
15 v. )  
16 NATIONWIDE MUTUAL INSURANCE )  
17 COMPANY, DOE ONE, DOE TWO, DOE )  
18 THREE, DOE FOUR, DOE FIVE, DOE SIX, )  
19 DOE SEVEN, DOE EIGHT, DOE NINE, AND )  
DOE TEN,, )  
Defendants. )

NOTICE OF REMOVAL OF ACTION  
PURSUANT TO 28 U.S.C. § 1441(b)  
(DIVERSITY) AND JURY DEMAND

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE THAT Defendant Nationwide Mutual Insurance Company  
("Nationwide Mutual"), by and through its undersigned attorneys of record, hereby remove to this  
Court the state court action described below.

**JURISDICTION AND VENUE**

1. This Court has subject matter jurisdiction of this action under 28 U.S.C. §1332, and  
is one which may be removed to this Court by Nationwide Mutual pursuant to the provisions of  
28 U.S.C. §1441(b), in that it is a civil action between citizens or subjects of a foreign state and a

4836-0458-2402.1

1 citizen of a different state, and the amount in controversy as alleged in the complaint exceeds the  
2 sum of \$75,000, exclusive of interest and costs.

3           2.     Venue is proper in the Northern District of California pursuant to 28 U.S.C. §§  
4     1391(b) and (c), because Plaintiff is subject to personal jurisdiction in this judicial district and a  
5     substantial part of the events giving rise to this lawsuit occurred in this division of the Northern  
6     District of California.

## **GROUND FOR REMOVAL**

8       3.       On January 3, 2007, Plaintiff JANICE R. RUSSELL, Trustee of the MASSA  
9 FAMILY TRUST (“Plaintiff”), by and through her attorneys of the law firm of DeMeo DeMeo &  
10 West, filed a civil action in the Superior Court of the State of California for the County of Napa  
11 against Nationwide Mutual, entitled *Janice R. Russell, Trustee of the MASSA FAMILY TRUST, v.*  
12 *Nationwide Mutual Insurance Company, Doe One, Doe Two, Doe Three, Doe Four, Doe Five,*  
13 *Doe Six, Doe Seven, Doe Eight, Doe Nine, and Doe ten*, Napa County Superior Court Case No.  
14 26-40617. A true and correct copy of the complaint is attached as Exhibit A.

15 4. Plaintiff's Complaint was served on Nationwide Mutual on January 15, 2008.  
16 Thus, the time limit for removal set forth in 28 U.S.C. §1446(b) has been satisfied.

17       5.       The basis for removal is that Plaintiff is a citizen and resident of the State of  
18 California, while Nationwide Mutual is a corporation organized and existing under the laws of the  
19 State of Ohio, with its principal place of business in Des Moines, Iowa. This Court therefore has  
20 original jurisdiction of this action under 28 U.S.C. §1332 because Nationwide Mutual is a citizen  
21 or subject of foreign states and Plaintiff is a citizen of the State of California.

22       6. Plaintiff's Complaint alleges that she is entitled to recover a jury verdict in the  
23 amount of \$369,832.64, plus additional sums for additional items covered under the Policy, and  
24 also includes prayers for general damages, special damages, exemplary damages, attorney fees,  
25 prejudgment interest, and costs. It is well established that exemplary or punitive damages are part  
26 of the amount in controversy in a civil action. *See, e.g., Gibson v. Chrysler Corp.*, 261 F.3d 927,  
27 945 (9th Cir. 2001). Thus, Nationwide Mutual has satisfied its burden of showing that the amount

28 | //

1 in controversy substantially exceeds \$75,000, as required for removal pursuant to 49 U.S.C.  
2 §11706.

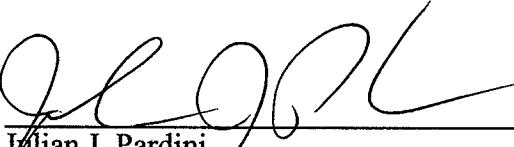
3 **DEMAND FOR JURY TRIAL**

4 7. Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Defendant Nationwide  
5 Mutual hereby demands a trial by jury.

6 WHEREFORE, Defendant Nationwide Mutual prays that this action be removed to this  
7 Court.

8  
9  
10 DATED: February 13, 2008

LEWIS BRISBOIS BISGAARD & SMITH LLP

11  
12 By 

13 Julian J. Pardini  
14 Attorneys for Defendant NATIONWIDE MUTUAL  
15 INSURANCE COMPANY

LEWIS BRISBOIS BISGAARD & SMITH LLP  
ONE SANSOME STREET, SUITE 1400  
SAN FRANCISCO, CALIFORNIA 94104  
TELEPHONE (415) 362-2580

*Exhibit "A"*

1 JOHN F. DeMEO, ESQ. - SBN: 28891  
2 JOSHUA M. WEST, ESQ. - SBN: 118463  
3 CARMEN D. SINIGIANI, ESQ. - SBN: 238895  
4 DeMEO DeMEO & WEST  
5 565 WEST COLLEGE AVENUE  
6 SANTA ROSA, CA 95401  
7 (707) 545-3232 PHONE  
8 (707) 545-1725 FAX

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Attorneys for Plaintiff  
JANICE R. RUSSELL, Trustee of the  
MASSA FAMILY TRUST

**ENDORSED**

JAN 03 2008

Clerk of the Napa Superior Court  
By: N. BENAVIDEZ

CASE MANAGEMENT CONFERENCE  
DATE: 2-11-08  
TIME: 8:30am  
PLACE: Courtroom A  
825 Brown Street, Napa CA 94559

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF NAPA**

JANICE R. RUSSELL, Trustee of the MASSA  
FAMILY TRUST

Plaintiff,

vs.

NATIONWIDE MUTUAL INSURANCE  
COMPANY, DOE ONE, DOE TWO, DOE  
THREE, DOE FOUR, DOE FIVE, DOE SIX,  
DOE SEVEN, DOE EIGHT, DOE NINE, and  
DOE TEN,

Defendants.

Unlimited Civil

**DEFENDANT'S COUNTER**

No. 26-40617

**COMPLAINT**

(Breach of Contract, Breach of  
Covenant of Good Faith and Fair  
Dealing - Fire Insurance Policy)

**FIRST CAUSE OF ACTION AS AGAINST  
ALL DEFENDANTS  
(Breach of Contract)**

Plaintiff JANICE R. RUSSELL, trustee of the MASSA FAMILY TRUST complains  
against Defendants NATIONWIDE MUTUAL INSURANCE, DOE ONE, DOE TWO, DOE  
THREE, DOE FOUR, DOE FIVE, DOE SIX, DOE SEVEN, DOE EIGHT, DOE NINE, and  
DOE TEN and each of them, and alleges for first cause of action as follows:

1. Plaintiff JANICE R. RUSSELL, as Trustee of the MASSA FAMILY TRUST, is, and  
at all times herein mentioned was, the owner of certain real property with a warehouse storage

1 facility, a detached garage, and certain personal property located therein at 2243 Clay Street, City  
2 of Napa, County of Napa, California, hereinafter referred to as "the insured premises."

3 2. JANICE R. RUSSELL is, and at all times herein mentioned was, the trustee of the  
4 MASSA FAMILY TRUST.

5 3. Defendant NATIONWIDE MUTUAL INSURANCE COMPANY is, and at all times  
6 herein mentioned, a corporation organized and existing under the laws of Ohio, and authorized to  
7 transact and transacting the business in California. At all times herein mentioned, Defendant  
8 NATIONWIDE MUTUAL INSURANCE COMPANY was, and now is, engaged in the business  
9 of writing insurance policies insuring against, among other things, loss of fire, and in such  
10 policies providing for payment of the amount fixed therein in the event of loss by fire of the  
11 property described and covered by such policies, in Napa County, California, as well as other  
12 areas of California and the United States.

13 4. Defendants DOE ONE and DOE TWO, are, and at all times herein mentioned,  
14 corporations authorized to transact and transacting business in California. At all times herein  
15 mentioned, Defendants DOE ONE and DOE TWO were, and now are, engaged in the business of  
16 writing insurance policies insuring against, among other things, loss of fire, and in such policies  
17 providing for payment of the amount fixed therein in the event of loss by fire of the property  
18 described and covered by such policies, in Napa County, California, as well as other areas of  
19 California and the United States.

20 5. The true names or capacities, whether individual, corporate, associate or otherwise, of  
21 Defendants, DOE ONE to DOE TEN, are unknown to Plaintiff, who therefore sues said  
22 Defendants by such fictitious names, and Plaintiff will amend this complaint to show their true  
23 names and capacities when the same have been ascertained. Plaintiff is informed and believes  
24 and thereon alleges that each of the Defendants designated herein as a Doe are legally responsible  
25 in some manner for the events and happenings herein referred to, and legally caused injury and  
26 damages proximately thereby to the Plaintiff as herein alleged. Plaintiff is informed and  
27 believes and thereon alleges that DOES ONE through TEN, are citizens and residents of the  
28 State of California and/or corporations authorized to transact business in the State of California,

1 who either issued the said policy, made representations, and promises to Plaintiff during the sale  
2 of the Policy, which is the subject matter of this action or participated in processing Plaintiff's  
3 claim for benefits under the Policy, which is the subject matter of this action.

4           6. At all times herein mentioned, Defendants NATIONWIDE MUTUAL INSURANCE  
5 COMPANY, DOE ONE and DOE TWO were the agents and employees of each other and of the  
6 remaining defendants, DOES THREE through TEN, and were at all times acting within the  
7 purpose and scope of said agency and employment, and each defendant has ratified and approved  
8 the acts of his or its agent.

9       7. On or about June 15, 2006, Defendants, and each of them, in consideration of the  
10 payment by Plaintiff to Defendants of the premium of \$2,025.00, issued a written policy of  
11 insurance, No. ACPCPP7850698462, hereinafter referred to as "the policy," to Plaintiff. By the  
12 terms of the policy and in consideration of the aforesaid payment, Defendants, and each of them,  
13 insured Plaintiff for a period of 12 months, from June 15, 2006 to June 15, 2007, against, among  
14 other things, loss by fire of the property mentioned in Paragraph 1 with the following coverages,  
15 among others:

	COVERAGE	LIMITS OF LIABILITY
16		
17	A. Commercial warehouse storage facility and detached garage, located 2243 Clay Street, Napa, California.	\$966,300.00 (90% of value)
18		
19	* B. Business Income Loss	\$31,500.00
20	C. Increased Cost of Construction Due to Enforcement of Ordinances or Law	\$10,000.00
21	D. Debris Removal	\$10,000.00
22	E. Pollutant Clean Up and Removal	\$10,000.00

24 A copy of the insurance policy is attached hereto as Exhibit A and is hereby referred to  
25 and made a part hereof as fully as if it were set out at length herein.

26       8. On or about August 25, 2006, while the policy was in full force and effect, the above-  
27 described warehouse storage facility, detached garage, and personal property therein were totally  
28

1 destroyed by fire, thereby causing Plaintiff to sustain a loss in the sum of \$984,016.02 for the  
2 warehouse storage facility and detached garage, plus further sums for loss of personal property  
3 therein, and other sums for additional expenses incurred for cleanup costs, pollution cleanup,  
4 debris removal, fencing rental and other incidental expenses relating thereto. Plaintiff's losses  
5 and damages in respect to loss of personal property, cleanup costs, pollution cleanup, debris  
6 removal, and all other ongoing and incidental expenses are not presently fully ascertained and  
7 Plaintiff prays leave to insert and prove these elements of damages in this respect when the same  
8 are fully determined.

9 9. Immediately after sustaining the loss, to wit, on August 25, 2006, Plaintiff gave  
10 Defendants written notice of the fire and loss.

11 10. On January 24, 2007, Defendants issued a check in the amount of \$528,902.42, for  
12 what Defendants represented as the replacement cost for the warehouse building loss, less the  
13 \$1,000 deductible and less the sum of \$75,000 previously advanced to Plaintiff. Defendants also  
14 issued eight (8) checks totaling \$56,895.75 for partial payment of incidental expenses including  
15 cleanup costs, pollution cleanup, debris removal, fencing rental, and lost rental income.

16 11. By letter dated February 7, 2007, Defendants extended the filing date for the Sworn  
17 Statement in Proof of Loss to February 28, 2007. By letter dated February 16, 2007, Plaintiff,  
18 through Plaintiff's counsel, submitted the Sworn Statement in Proof of Loss to Defendants.

19 12. After receipt of the Sworn Statement in Proof of Loss, Defendants notified Plaintiff  
20 by letter dated February 26, 2007, that they were taking exception to the Proof of Loss and would  
21 refuse to accept it. Plaintiff's counsel responded by letter dated March 6, 2007, stating that  
22 Plaintiff had taken steps to obtain contracting bids and that a supplemental Proof of Loss would  
23 be provided by way of forwarding a licensed contractor's estimate of the replacement cost of the  
24 building when received.

25 13. By letter dated March 16, 2007, Defendants extended the time to serve Plaintiff's  
26 supplemental Proof of Loss to March 26, 2007, even though the Proof of Loss had already been  
27 submitted and received by Defendants, which Proof of Loss stated that the claim was in the full  
28 amount of the policy coverage of \$966,300, plus the other benefits provided thereunder.

1       14. By letter dated, April 2, 2007, Defendants notified Plaintiff that they will be denying  
2 any future claims stating, arbitrarily, that "adequate time" has passed to enable the insured's to  
3 file a complete Proof of Loss. Defendants stated further, in said letter, that all further claims  
4 submitted under the Policy were denied, even though Plaintiff had provided a sworn Proof of  
5 Loss within the time limited imposed by Defendants.

6       15. Defendants have failed and refused to pay Plaintiff the full amount of loss sustained  
7 by her as a result of the fire and within the policy limits (as set forth in Exhibit A) as alleged in  
8 paragraph 8. Defendants, without legal cause or right, continue to refuse to pay to Plaintiff the  
9 balance owed under the policy.

10       16. Plaintiff has performed all of the conditions of the policy to be performed on her part,  
11 except for the requirement that this action be commenced within 12 months from the date of loss.  
12 Defendants waived this requirement and are estopped to rely on it for the following reasons: (1)  
13 Defendants agreed, in writing, to toll the period for filing an action until January 26, 2008; (2)  
14 After receiving notice of the loss, Defendants participated with Plaintiff in negotiations looking  
15 to a compromise settlement of the amount of her claim and led Plaintiff to believe to rely on  
16 Defendants' statements that the amount due would be paid; (3) These negotiations and  
17 representations extended over a period beyond twelve months following the loss; (4) It was not  
18 until April 2, 2007, that Defendants stated, in writing, that they would not continue to negotiate  
19 the claim and, in effect, Defendants arbitrarily, capriciously, and without legal cause, denied  
20 Plaintiff's claim on April 2, 2007 and refused to recognize any and all additional losses suffered  
21 by Plaintiff which are covered under the Policy.

22       17. As a direct and proximate result of Defendants' failure and refusal to pay Plaintiff the  
23 full amounts agreed by it to be paid in the event of loss by fire, Plaintiff has been damaged in the  
24 sum of \$369,832.64 as and for the balance owed to Plaintiff for destruction of the property plus  
25 additional sums for additional items covered under the Policy.

26       \\  
27       \\  
28       \\

**SECOND CAUSE OF ACTION AS AGAINST  
ALL DEFENDANTS**  
**(Breach of Covenant of Good Faith and Fair Dealing)**

Plaintiff JANICE R. RUSSELL, trustee of the MASSA FAMILY TRUST complains against Defendants NATIONWIDE MUTUAL INSURANCE, DOE ONE, DOE TWO, DOE THREE, DOE FOUR, DOE FIVE, DOE SIX, DOE SEVEN, DOE EIGHT, DOE NINE, and DOE TEN, and each of them, and alleges for a second cause of action as follows:

18. Plaintiff realleges and incorporates herein by reference each and every allegation contained in Paragraphs one through seventeen inclusive of the first cause of action hereinabove set forth.

19. The Policy was purchased by Plaintiff in the reasonable expectation that it would provide coverage for claims relating to Plaintiff's commercial warehouse, the detached garage, and the contents, including claims due to a fire loss and that Defendants would deal with Plaintiff fairly, equitably, in good faith and in full conformity with the express and implied terms of the policy. This expectation was brought about and intended by Defendants as a result of the contractual language in the Policy and by the express representations of the respective employees, agents and representatives of Defendants.

20. Defendants, and each of them, breached the implied covenant of good faith and fair dealing under the policy by unreasonably denying Plaintiff's claim without proper legal cause in that Defendants refused to process the balance of Plaintiff's claims. Defendants, and each of them, were aware that they and each of them had no valid defense against payment of said claims. Defendants were informed through multiple letters that Plaintiff was actively pursuing contracting bids for the destroyed premises as the bid provided by Defendants was inadequate and failed to express the actual loss of Plaintiff. Plaintiff had submitted a Proof of Loss and informed Defendants that it would be supplemented with a contractor's estimate of the loss, as soon as an estimate could be had and that Defendants' estimate of the loss was inadequate, low, and not in conformity with the benefits provided for in the subject insurance policy.

27 21. Defendants responded that they felt their construction bid was adequate, stating, in  
28

1 their letter of February 7, 2007, that:

2 "I understand from your letter that the insured is now not  
3 necessarily in agreement with the bid from Bowman Construction  
4 and that you are reviewing this matter further. Mr. Bowman was  
5 hired by Nationwide Mutual to work with the insured (Michael  
6 Clark)(sic) to determine the cost to reconstruct the damaged  
7 building as it was in its pre-loss state. Since the building was a  
8 total loss, Mr. Bowman spent a lot of time with Mr. Clark to get  
9 his input on the layout and provided Mr. Clark with a copy of the  
10 bid for review.... please keep in mind that the Bowman bid has  
11 many open items. These are items such as permits, landscaping,  
12 engineering, etc. These are covered costs however; we need actual  
13 bids in order to pay them."

14 22. Instead of cooperating with and working with Plaintiff and allowing Plaintiff  
15 adequate time to obtain her own contractor to determine the replacement cost of the buildings,  
16 Defendants rejected Plaintiff's Proof of Loss, stating in their February 26, 2007 letter:

17 "Unfortunately, we must take exception to it for the following reasons.  
18 1. Item 7 - The Actual Cash Value....-was filled in 'To Be Determined'.  
19 2. Item 8 - The Whole Loss and Damage...-was filled in 'To Be  
20 Determined'  
21 3. Item 9 - The Amount Claimed...-was filled in 'To Be Determined; not  
22 less than policy limits.'

23 As I'm sure you are aware, the Proof of Loss is the insured's Sworn  
24 Statement of Loss. It should be precise as to what the insureds are making  
25 claim for and what they feel their loss is. We cannot accept this Proof as it  
26 remains open ended."

27 In Defendants' letter of February 7, 2007, they indicated that their contractor's bid had  
28 many open items but nonetheless refused to accord Plaintiff the same courtesy, status, and  
position as to Plaintiff's open items.

29 23. On or about March 16, 2007, Defendants again inexplicably advised that the Proof  
30 of Loss and the Policy required immediate compliance even though they acknowledged that  
31 Plaintiff had not yet been able to obtain contracting bids or estimate which were necessary in  
32 order to accurately ascertain the Plaintiff's loss under the policy. In their letter of March 16,  
33 2007, Defendants state, in part:

34 "Please provide me with the names of the contractors you are  
35 having bid the job and I will set up a meeting with all the parties to  
36 move forward on this issue. We feel that ample time has gone by  
37 now and the insured should have been able to obtain at least one  
38 bid for our review. We were able to accomplish this by January by  
39 working with Mr. Clark.

1                   In regards to your comments on the Proof of Loss, please  
2                   remember that it is a condition of the contract. Per my letter to you  
3                   dated February 26, 2007 we have extended the filing date yet again,  
4                   to March 26, 2007. Failure to comply with this provision *may*  
5                   jeopardize coverage for the remainder of the insured's claim.  
6                   (emphasis added)."

7                   24. On March 26, 2007, Plaintiff, through her counsel, responded by facsimile and U.S.  
8                   Mail, to Defendants letter of March 16, 2007, stating, in part:

9                   "Thank you for extending the filing date on the Proof of Loss. I  
10                  do want to bring your attention that the Proof of Loss has already  
11                  been filed. It will be supplemented in due time. I am sure you can  
12                  understand the severe shock of having a fire destroying ones  
13                  property and then having to deal with the issues that one is  
14                  confronted with as a result of such a loss. Janice Russell and  
15                  Michael Clark are doing everything they can to move the matter  
16                  forward. Again, March 26, 2007, is not a realistic deadline,  
17                  especially in view of the fact that the Proof of Loss has already  
18                  been filed and will be supplemented in due time."

19                  25. Only two weeks later and without prior notice, Defendants arbitrarily cut-off  
20                  Plaintiff's right to any further reimbursement under the policy notwithstanding the fact that  
21                  Defendants were not and to this date are not prejudiced by a further extension of time to  
22                  supplement the Proof of Loss. In their letter of April 2, 2007, they stated, in part:

23                  "We feel that adequate time has passed to enable the  
24                  insured's to file a Proof of Loss. We have asked on several  
25                  occasions to meet with and your contractors to try to move the  
26                  scope and estimating process forward....It does not seem  
27                  reasonable that the insured cannot provide an estimate for our  
28                  review and/or meet with us to go over the estimate that was  
                        submitted by Mr. Bowman to identify any possible errors."

29                  Based on the insured's failure to comply with the above  
30                  duties we regrettably must deny any further claims submitted under  
31                  the above referenced claim number. This includes but is not  
32                  limited to, the replacement costs pending on the structure and any  
33                  outstanding payment for fees."

34                  26. Plaintiff has subsequently submitted claims for additional funds due under the Policy,  
35                  however Defendants have refused to process the claims or respond at all. Moreover, Defendants  
36                  thereafter have not obtained and/or paid out costs and losses for several items of substantial  
37                  financial import disclosed in their Bowman Construction bid in which they acknowledged were  
38                  still in need of final payment. Defendants have paid Plaintiff only \$606,467.60 for her totally

1 destroyed buildings, which, upon Defendants' underwriting and recommendations, were insured  
2 for over \$966,000. The actual cost of replacement of the buildings destroyed is approximately  
3 \$984,016.22, as reflected in the Plaintiff's contractor's estimate, which was provided to and  
4 received by Defendants on or about December 7, 2007 as a supplement to Plaintiff's Proof of  
5 Loss.

6 27. Defendants, and each of them, have breached their duty of good faith and fair dealing  
7 owed to Plaintiff in the following respects:

8 (a) Unreasonable and bad-faith failure to make full benefit payments to Plaintiff and failing  
9 to attempt to settle the fire loss claim by their conduct in proposing and offering a bid that was  
10 substantially lower than that actually required to replace the destroyed buildings at a time when  
11 Defendants knew and acknowledged that Plaintiff was entitled to a replacement of the buildings  
12 with like kind and quality;

13 (b) Attempting to coerce Plaintiff into accepting a replacement cost proposal by Bowman  
14 Construction that was substantially less than that required to repair or replace the damaged  
15 property;

16 (c) Unreasonably withholding full benefit payments from Plaintiff in bad faith, knowing  
17 that Plaintiff's claim for benefits under the Policy lawfully and properly exceeded the sums  
18 Defendants represented was the sums to which Plaintiff was entitled;

19 (d) Failing to reasonably investigate and process Plaintiff's claim for benefits in that had  
20 Defendants adequately investigated the proposal by Bowman Construction, Defendants would  
21 have and should have determined the bid and proposal did not state the proper value or adequate  
22 value for restoration or repair of Plaintiff's property, nor did it adequately provide the extent of  
23 benefits due under the Policy;

24 (e) Not attempting in good faith to effectuate a fair and equitable settlement of Plaintiff's  
25 benefits in which liability therefore had become reasonably clear under Plaintiff's First Party  
26 Insurance Contract. Defendants have refused and continue to refuse to pay the full benefits to  
27 which Plaintiff is entitled under the terms of the Policy;

28 (f) Misrepresenting what coverage Plaintiff would be entitled to when a total fire loss

1 occurred, by selling Plaintiff a policy with coverage for the sum of \$966,300 in replacement cost  
2 coverage for the covered buildings and other benefits and then later claiming that the replacement  
3 cost is only \$682,467.60 less the sum of \$76,000 advanced to Plaintiff, even though there is clear  
4 evidence that the loss exceeds the coverage of \$966,300.

5 28. As a proximate result of the aforementioned unreasonable and bad faith conduct of  
6 Defendants, and each of them, Plaintiff has suffered, and will continue to suffer in the future,  
7 damages under the Policy, plus interest, and other economic and incidental damages, for a total  
8 amount to be determined at the time of trial pursuant to the evidence adduced.

9 29. As a further proximate result of the unreasonable and bad faith conduct of Defendants,  
10 Plaintiff was compelled to retain legal counsel to obtain the benefits due under the Policy.  
11 Therefore, Defendants are liable to Plaintiff for those attorneys' fees reasonably necessary and  
12 incurred by Plaintiff in order to obtain the Policy benefits in a sum to be determined at trial  
13 pursuant to the evidence adduced.

14 30. Defendants' conduct described herein was intended by Defendants to cause injury to  
15 Plaintiff and/or was despicable conduct, oppressive in nature and carried on by the Defendants  
16 with a willful and conscious disregard of the rights of Plaintiff; subjected Plaintiff to cruel and  
17 unjust hardship in conscious disregard of Plaintiff's rights, and constituted intentional  
18 misrepresentation, deceit, and/or concealment of material facts known to the Defendants with the  
19 intention to otherwise cause injury, such as to constitute malice, oppression, or fraud under the  
20 California Civil Code, thereby entitling Plaintiff to punitive damages in an amount appropriate to  
21 punish or set an example of Defendants.

22 WHEREFORE, Plaintiff prays judgment as follows:

23 1. For the sum of \$369,832.64 for the balance owed to Plaintiff for loss of the  
24 commercial warehouse storage facility and detached garage, plus all of the other benefits under  
25 the policy for unpaid incidental expenses and coverages (subject to the policy limit), plus interest  
26 thereon at the legal rate from December 5, 2007;

27 2. For punitive or exemplary damages in an amount appropriate to punish or set an  
28

1 example of Defendants;

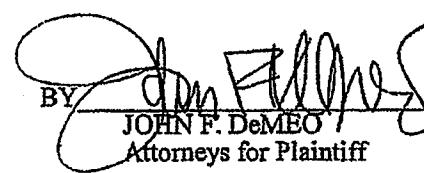
- 2       3. For costs of suit herein incurred;  
3       4. For attorneys' fees incurred by Plaintiff to obtain the policy's benefits in an amount to  
4       be determined at trial;  
5       5. For such other and further relief as the court may deem proper.

6  
7       Dated: January 2, 2008

DeMEO DeMEO & WEST

8       BY

9       JOHN F. DeMEO  
10      Attorneys for Plaintiff



11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **LEWIS BRISBOIS BISGAARD & SMITH LLP**  
2 JULIAN J. PARDINI, SB# 133878  
3 One Sansome Street  
4 Suite 1400  
5 San Francisco, California 94104  
6 Telephone: (415) 362-2580  
7 Facsimile: (415) 434-0882  
8 [pardini@lbbslaw.com](mailto:pardini@lbbslaw.com)

5 Attorneys for Defendant  
NATIONWIDE MUTUAL INSURANCE COMPANY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

JANICE R. RUSSELL, Trustee of the MASSA ) CASE NO. CV 08 0918 JCS  
FAMILY TRUST, )  
Plaintiff, ) PROOF OF SERVICE  
v. )  
NATIONWIDE MUTUAL INSURANCE )  
COMPANY, DOE ONE, DOE TWO, DOE )  
THREE, DOE FOUR, DOE FIVE, DOE SIX, )  
DOE SEVEN, DOE EIGHT, DOE NINE, AND )  
DOE TEN,, )  
Defendants. )

4850-5804-0066.1

-1-

---

## PROOF OF SERVICE

---

## **FEDERAL COURT PROOF OF SERVICE**

*Janice R. Russell, et al. v. Nationwide Mutual Insurance Company, et al. -*  
File No. CV 08 10918 JCS

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to the action. My business address is One Sansome Street, Suite 1400, San Francisco, California 94104. I am employed in the office of a member of the bar of this Court at whose direction the service was made.

On February 14, 2008, I served the following document(s):

- 1) Civil Cover Sheet;
  - 2) Notice of Removal of Action Pursuant to 28 U.S.C. § 1441(B) (Diversity) and Jury Demand;
  - 3) Certification of Interested Entities or Persons [N.D. Cal. Local Rule 3-16];
  - 4) Order Setting Initial Case Management Conference and ADR Deadlines;
  - 5) ECF Registration Information Handout;
  - 6) Notice of Assignment of Case to a United States Magistrate Judge for Trial; and
  - 7) Welcome to the U.S. District Court, San Francisco (Information Sheet)

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

John F. DeMeo, Esq.  
DeMeo DeMeo & West  
565 W. College Avenue  
Santa Rosa, CA 95401  
Phone: (707) 545-3232  
Fax: (707) 545-1725

The documents were served by the following means:

(BY U.S. MAIL) I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and I deposited the sealed envelope or package with the U.S. Postal Service, with the postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 14, 2008, at San Francisco, California.

Karen D. Koch  
Karen D. Koch